No. 21167

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PERLEY M. LEWIS and MILDRED C. LEWIS, Appellants, STEWART L. UDALL, as Secretary of the United States Department of the Interior, et al, Appellees.	On appeal from the United States District Court for the District of Arizona

APPELLANTS' REPLY BRIEF

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STATEMENT OF THE CASE

In the Court below this matter was first brought to the attention of the Court by Appellees' Motion for Summary Judgment to which Appellants responded and filed their own Motion for Summary Judgment. The facts as set forth by Appellants in their Motion for Summary Judgment were not disputed by Appellees and are therefore not at issue in any way.

The facts as set forth in Appellants' original brief beginning on Page 5 dealing with history of the case are therefore the facts which this Court must take as true for the purposes of this appeal.

Appellants again bring to the attention of the Court several

of those matters which Appellees overlooked in their statement of the case which were stated in Appellants' Brief.

The notice of sale used in the original sale had no conditions or reservations upon the same as do the present notices of sale and did not contain any conditions that the authorized officer had the power to reject any bids prior to the issuance of a cash certificate.

Appellants again point out that in the lower Court as set forth in Appellants' Brief, the Appellees admit that Appellants had taken proper procedure under 43 CFR 250 and by January 25, 1960, the Appellants had done everything necessary required of them under the law and regulations to purchase the land and that the only remaining thing to be done was a ministerial act of the manager in directing the issuance of cash certificate and patent and that the manager failed to do so for over five months.

Further, Appellees failed to acknowledge in their statement of the case those facts as set forth by Appellants in their opening brief pointing out the unusual delay involved in this case and the unusual application of an (unpublished in the Federal Register) Press Release policy to twice strike down Appellants' entry and Appellees failed to point out that unlike in the *Ferry* case and entirely different from the *Ferry* case, there was no mention of improper appraisal of the land until the final decision of the Secretary over four years after the initial approval of the sale and failed to acknowledge what they did in the lower Court, to-wit: That this appraisal was reached after the Secretary had already issued an unsigned written decision in essence telling the appraiser that he wanted the land to be appraised at higher than the original appraisal (See Appellants' Opening Brief, Page 11).

Appellee also leaves out the fact that was admitted in the lower Court that Appellants were classified as speculators, a point which is very important to one of Appellants' grounds for appeal.

STATUTES AND REGULATIONS INVOLVED

On Page 1 of Appellees' Brief their quotation of Section 7 of the Taylor Grazing Act, 43 USC, Section 315 F is correct except on the ninth line of their quote of said section after the word "production" they leave out the words, evidently by typographical error as follows: "of agricultural crops than for the production".

They also leave out that section of the Statute which is important to this case which follows after the last line of their quotation of Section 7 and said deleted portion reads as follows:

> ". . . Provided, that locations and entries under the Mining Laws, including the Act of February 25, 1920, as amended, may be made upon such withdrawn and reserved areas without regard to classification and without restriction to limitations by any provisions of this Act. Where such lands are located within grazing districts, reasonable notice shall be given by the Secretary of the Interior to any permittee of such lands. *The applicant after his entry, selection or location, is allowed, shall be entitled to the possession and use of such lands:* Provided *that upon the application of any applicant qualified to make entry, selection or location, under the Public Land Laws, filed in the land office of the proper district, the Secretary of the Interior* shall cause any tract to be classified and such application if allowed by the Secretary of the Interior, *shall entitle* the applicant to a preference right to enter, select, or locate such lands if opened entry as herein provided. (43 USC, Section 315f)." (Emphasis Supplied)

Appellees correctly quote certain portions of Part 250 of 43 CFR, to-wit: 43 CFR 250.5, 43 CFR 250.11 (a), 43 CFR 250.11 (f) and 43 CFR 250.12 (c). However, the whole part 250 or 43 CFR applies and one particular part is quite important for this Court to consider to reject one of the positions of Appellees in their Brief.

43 CFR 250.4 (b) states as follows:

> "(b) The authorized officer may classify *under Section 7 of the Taylor Grazing Act* of June 28, 1934 (48 Stat. 1272; 43 USC 315 (f) as amended, *land for offering under this part,*

and he may authorize such offering of the land for sale if he determines, in accordance with existing regulations and procedures, that such land is suitable for disposal *as an isolated or as a rough or mountainous tract, as the case may be.*" (Emphasis Supplied)

Other regulations which the Court should consider in Appellants' Response to Appellees' Brief are 43 CFR 296 which deals with the classification of public lands under Section 7 of the Taylor Grazing Act and shows that Section 7 is used for the classification of all sorts of lands, not just homesteads. The appropriate regulations are as follows:

"Section 296.1. STATUTORY AUTHORITY. (a) *Section 7 of the act of June 28, 1934 (48 Stat. 1272),* as amended by the act of June 26, 1936 (49 Stat. 1976; 43 U.S.C. 315f), authorizes the Secretary of the Interior in his discretion to examine and classify *any lands withdrawn or reserved by Executive* Order 6910 of November 26, 1934, or Executive Order 6964 of February 5, 1935, and amendments thereto, *or within a grazing district,* which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than the use provided for under said act, or proper for acquisition in satisfaction of any outstanding lien, exchange, or scrip rights or land grant, and *to open such lands to entry, selection, or location* for disposal in accordance with such classification *under applicable land laws.* Executive Order 6910, Executive Order 6964, and Section 7 of the Taylor Grazing Act, do not apply to public lands in the Territory of Alaska."

"Section 296.6 PREFERENCE RIGHT OF APPLICANT; ORDER OF OPENING TO BE ISSUED WHERE PREFERENCE-RIGHT APPLICATION IS REJECTED. *Where public land is classified under section 7 of the Taylor Grazing Act* pursuant to an application, *the applicant is entitled to a preference right of entry.* If, however, after classification it should be necessary for any reason to reject the application, the land will not become subject to application by persons other than the preference-right applicant until an appropriate order of opening has been issued."

"Section 296.7 REQUIREMENTS TO EARN TITLE. *Upon allowance of an application to make entry,* location or selection of public land classified as provided in Sections 296.1-296.9, all the laws and regulations governing the particular kind of entry, location, or selection applied for must be complied with in order *to earn title to the land.*" (Emphasis Supplied).

Appellants would also like to point out that Appellees point to the Secretary's new regulations which have been in effect since 1964 completely emasculating and changing 43 CFR 250.5 These regulations are in many ways entirely different from 43 CFR 250 which was in effect when Appellants' case arose.

SUMMARY OF ARGUMENT

Appellants again request the Court to pay particular attention to the arguments set forth in Appellants' Brief but for the purposes of this Reply Brief reply to Appellees' summary of argument as follows:

I

The Court in the *Ferry* case failed, for one reason or another, to take into consideration all of the regulations as set forth by appellants and the Statutes which Appellants state are applicable to the case at hand.

II

The facts involved in this case are not identical to those in the case of *Ferry vs. Udall*, 336 F2d 706 (CA 9, 1964) and Appellants state that the procedure taken by the Secretary and the actions taken by the Secretary and the office under his supervision were entirely different than those stated in the Ferry case.

Appellants have shown that the *Ferry* decision in part was in error. That rights do accrue prior to the issuance of a cash certificate. That the gravamen of the situation is not the issuance of the cash certificate but the acts done by the entryman that entitled him to a cash certificate. That Section 7 of the Taylor Grazing Act *does not deal exclusively with homesteading* but

on the contrary has direct application to the sale of isolated tracts under Section 14 of the Taylor Grazing Act as it will be clearly shown herein by the statutes and by the Secretary's own regulations in force and effect at the time this case arose. That the remaining arguments of Appellants in their brief are very relevant and with merit.

That the specification of errors relied on by Appellants and the questions presented are applicable to the facts at hand and are determinative of this case.

ARGUMENT

I.

The rights of the Appellants, their denial, the error of the Ferry case and its inapplicability to the case at hand.

Apellees' Brief, in one sentence, on Page 1, disposes of the matter of the opinion below. And in two sentences on Page 2, both citing *Ferry vs. Udall*, 336 Fed. 2d 706 (CA 9, 1964) cert. den. 381 U.S. 904 dispose of the questions presented.

For a summary of the opinion of the Court below, we respectfully call attention to Pages 12 and 13 of Appellants' Brief and particularly the language of the Court below in the last paragraph thereof which appears on Page 195 of the record.[1]

In this decision the equities are well stated by the Court but we feel, the remedy is misstated.

Assuming, merely for the purposes of argument, that the facts

[1]"Notwithstanding the foregoing and the resulting judgment in this matter, it appears to this Court that either the statutes or the regulations of the Department are sorely in need of revision. This, in order that citizens of the United States who, in good faith, comply with the many tedious requirements in order to insure their qualification to come within the scope of the statutes and regulations for the acquisition of public lands duly noticed for sale, are not summarily cast aside by a change in policy or summary decisions to withhold the cash certificate. The remedy for this unhappy situation rests, however, with the Congress of the United States, or the Executive Department, and not with the Courts."

in this case were similar to the facts in the *Ferry* case, which they are not as set out in Appellants' Brief and admitted by Appellees, the whole gravamen is the misinterpretation of one particular regulation of the Secretary, 43 CFR 250.5. This regulation should be considered carefully in the light of Appellants' Brief on Pages 28, 29 and 30. The power to determine under this regulation should be the power to determine in a judicial nature. This Court should agree with the Supreme Court of the United States in *Payne vs. New Mexico* (1921) 225 US 367 as to what the true import of language similar to that contained in 43 CFR 250.5 is. This point was also agreed to by the Supreme Court of the United States in *Wyoming vs. United States*, 255 US 489 (1921).

The essence of the claim of the Secretary of the Interior as to the meaning of the discretionary power given to him by 43 CFR 250.5 is to interpret the same as to give him dictatorial power to use against people who have made a qualified entry such as the Appellants in this case. Hower, the truth of this power is best described by the Supreme Court of the United States in *Daniels vs. Wagner*.[2]

As set forth on Pages 35 and 36 of Appellants' Brief and which we repeat here in part as follows:

> ". . . When these conclusions are accepted it results that the claim of discretionary power is substantially this: That in a case where, under an Act of Congress, a right is conferred to make an application to enter public land, and a duty imposed upon the Department to permit the entry, the Department is authorized in its discretion to refuse to allow that to be done which is commanded to be done, and thus deprive the individual of the right which the law gives him. And it becomes, moreover, certain that the necessary result of this assertion is the following: That although Congress may have the power to provide for the disposition of the public domain *and fix the*

[2]237 US 547, 557, et seq., 35 S. Ct. 740, 59 L. Ed. 1102, LRA 1916A, 1116.

terms and conditions upon which the people may enjoy the right to purchase, it has not done so, since every command which it has expressed on this subject may be disregarded, and every right which it has conferred on the citizen may be taken away by an unlimited and undefined discretion which is vested by law in the administrative officers appointed for the purpose of giving effect to the law. When the true character of the proposition is thus fixed, it becomes unnecessary to go further to demonstrate its *want of foundation*." (Emphasis supplied).

There are five questions presented to this Court, not two as Appellees would have this Court determine. These qustions are presented in Appellants' opening brief and involve not only abuses of discretion by the Department and the Secretary of the Interior, but also involve a non-compliance with an Act of Congress, which Act he is charged with the administration of.

The questions presented involve acts and proceedings which are not governed by any so-called "Isolated Tracts Act". They are governed by and come under Section 7 and Section 14 of the Taylor Grazing Act of June 28, 1934, Section 14 being 43 USC 1171 and Section 7 now being 43 USC 315f and Section 7 having been amended in the year 1936.

The questions presented also involve violations of the rights of Appellants under the Constitution and the Fifth and Fourteenth Amendments thereto.

The facts in this case show clearly that the subject public auction sale was made under 43 USC 1171, which is to say Section 14 of the Taylor Grazing Act, using procedures set forth under Section 7 of the same Taylor Graving Act which is now set forth in the code as 43 USC 315f. This the Appellees' Brief admits, but immediately Appellees desire to start calling this a separate act, to-wit: "The Isolated Tracts Act" when in essence it is nothing more than the "isolated and disconnected and rough and mountainous" section 14 of the Taylor Grazing Act.

This Appellees do because they would obviously like to maintain the fiction set up in *Ferry vs. Udall*, supra, that it was based

on a separate Congressional Act some eighty years of age, to-wit: "The Isolated Tracts Act".

The decision in the *Ferry vs. Udall* case never mentioned by name the Taylor Grazing Act nor did it mention by name either Section 14 or Section 7 of the Taylor Grazing Act but referred throughout to a non-existent "Isolated Tracts Act".

As Appellants states, on Page 5 under "(b) History of the Case" by reason of Appellees' Motion for Summary Judgment in the Court below, Appellants' facts as stated by Appellants *are not in dispute*. Appellees attempt to maintain the fiction that the sale was held under some non-existent act known as the "Isolated Tracts Act" which never was a separate act of Congress at all but merely a section of an Act kown as the Taylor Grazing Act.

Why and how do Appellees now try to do this?

First, on Page 2 of their Brief, when they mentioned Section 14 of the Taylor Grazing Act, they hasten to refer to it as "The Isolated Tracts Act" and they again and again do this wherever possible at presumptively telling points in their prief.

Secondly, they never fully quote all the language of Section 14 of the Taylor Grazing Act. On pages 2 and 3 of their brief, although they do not say in prelude that Section 14 provides in part, they merely say it "provides".

And then they proceed to quote only the first proviso of Section 14 and leave out entirely the last eleven lines of that section which includes not only the second proviso (the rough and mountainous section) but another proviso also.

This in an apparent attempt to not disclose the fact that as expanded and inserted into the Taylor Grazing Bill by the Senate of the United States, and as it was in said Bill and finally adopted in conference, (not as an amendment to the Act after its passage), the said Section 14 was expanded into a section which, as passed as an integral part of the entire Bill and subject to all the language thereof, was in fact "the isolated and disconnected and rough and

mountainous"[3] section of the Taylor Grazing Act (in like manner as its Section 8 was another disposal section providing for exchanges thereunder).

Section 14 was in the Taylor Grazing Act when it became law on June 28, 1934 (48 Stat. 1269).

Third, Appellees allege on page 18 of their brief that Section 7 of the Taylor Grazing Act has nothing whatsoever to do with the disposal sections of the Taylor Grazing Act. Specifically they allege that "Section 7 deals exclusively with homesteading".

This statement is simply not true. The record is clear that from December 31, 1954, up to April 1, 1964, public sales were governed by Part 250 of the regulations.[4] And that during all of that time there were in as a part of those regulations two sections of 43 CFR as follows:

> "43 CFR 250.1 'Statutory Authority' and 43 CFR 250.4 (b) 'Action upon the application or in the absence of applications."

43 CFR 250.1 clearly recited Section 14 of the act of June 28, 1934 (48 Stat. 1274; 43 USC 1171).

43 CFR 250.4(b) stated in part as follows:

> "(b) The authorized officer may classify under Section 7 of the Taylor Grazing Act of June 28, 1934, (48 Stat. 1272; 43 USC 315f) as amended, land for offering under this part, and he may authorize such offering of the land for sale if he

[3]Congress never did enact a separate Act entitled "The Isolated Tracts Act". On August 3, 1846, there was approved "An Act providing for the Adjustment of all suspended Preemption Land Claims in the several States and Territories". Section 5 of this act provided for the sale of lands of the "second class" and also "isolated and disconnected" tracts. This section 5 was incorporated into the Revised Statutes as Section 2455, later amended, and further expanded by the Senate and placed in the House Bill, the Taylor Bill, in lieu of the language of the House, and the Senate version was agreed to and was in and a part of the Bill when it was approved and became law June 28, 1934, as The Taylor Grazing Act (48 Stat. 1269). The Section 5 of the Act of August 3, 1846, did not provide for public auction sale, did not provide for sale of rough and mountainous lands, did not provide for evaluation, and sold land at $1.25 per acre.

[4]43 CFR 250.1 and following.

determines in accordance with existing regulations and procedures, that such land is suitable for disposal *as an isolated or as a rough or mountainous tract, as the case may be.*" (Emphasis supplied).[5]

Moreover, for confirmation of this, one has but to refer to Part 296 of the regulations which were in effect unchanged from December 31, 1954, to April 1, 1964, to find spelled out in detail under 43 CFR 296.2 to 43 CFR 296.7 the *action upon the application* where classification is required under Section 7 of the Taylor Grazing Act. And a reading of these said sections show quite plainly that the application of Section 7 was *not* exclusively with homesteading; and they further show and spell out that upon the allowance of the application the applicant does have thereafter rights which, under 43 CFR 296.7 set forth the "Requirements to Earn Title", upon full compliance with the law and regulations.

But what about the language of Section 7 of the Taylor Grazing

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[5]In the case of Nelson A. Gerttula, A2-2716 (July 12, 1941 — Decisions of the Department of the Interior), the Department said:

"In large part, the national policy of conservation and development of the public domain and its natural resources is implemented by the Taylor Grazing Act and in particular as to classification by Section 7 and by the executive orders mentioned therein . . .

"This withdrawal and reservation may however be terminated by the Secretary in his discretion. Upon examination an appropriate classification of any of these withdrawn lands which the Secretary finds are less valuable for grazing than for some other of the uses described in Section 7, the Secretary has authority under this section to restore them to entry, selection or disposal in accordance with his classification under applicable public land laws."

In addition, it was stated on said case on Page 228 (64 ID.):
"However, the Secretary of the Interior is, by Section 7 of the Taylor Grazing Act, as amended authorized, in his discretion, to examine and classify any of the withdrawn lands which are more valuable or suitable for the production of agricultural crops and for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for by that act, or proper for acquisition in satisfaction of any outstanding lieu, exchanges, script rights or land grant, and to open such lands to entry, selection or location for disposal in accordance with such classification under applicable public land laws."

Act as quoted by Appellees in support of their contention that Section 7 deals exclusively with homesteading?

The answer is bluntly that Appellees on their said page in their said brief, particularly on Page 18, do not quote Section 7 of the Taylor Grazing Act. They quote only 68 words out of 329. They do this in three disconnected parts. They emasculate and dismember the section.[6]

The Taylor GrazingAct, by virtue of its authority under its Section 1 to set up grazing districts over the public domain, and by virtue of the withdrawal and reservation of the public domain lands under the Executive Orders set forth in the forepart of

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[6]For the edification of the Court, Section 7 is set forth below in full. Those portions italicized are those portions which Appellees deleted from their quotation of Section 7:

"Section 7. The Secretary of the Interior is hereby authorized in his discretion, to examine and classify any lands, *withdrawn or reserved by Executive order of November 26, 1934 (numbered 6910), and amendments thereto, and Executive order of February 5, 1935 (numbered 6964), or within a grazing district*, which are more valuable or suitable for the production of agricultural crops *than for the production of native grasses and forage plants, or more valuable or suitable for any other use than the use provided for under this Act or proper for acquisition in satisfaction of any outstanding lieu, exchange or scrip rights or land grant*, and to open such lands to entry, selection or location for disposal in accordance with such classification under applicable public-land laws except that homestead entries shall not be allowed for tracts exceeding three hundred and twenty acres in area. *Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry; PROVIDED, that locations and entries under the mining laws, including the Act of February 25, 1920, as amended, may be made upon such withdrawn and reserved areas without regard to classification and without restrictions and limitations by any provision of this Act. Where such lands are located within grazing districts reasonable notice shall be given by the Secretary of the Interior to any permittee of such lands. The applicant, after his entry, selection or location, is allowed, shall be entitled to the possession and use of such lands; PROVIDED, that upon the application of any applicant qualified to make entry, selection or location, under the public land laws, filed in the land office of the proper district, the Secretary of the Interior shall cause any tract to be classified, and such application, if allowed by the Secretary of the Interior shall entitle the applicant to a preference right to enter, select, or locate such lands if opened to entry as herein provided. (43 USC, Section 315f).*"

Section 7, has an iron-clad control of the public domain. This was true before passage of the multi-use act in 1965, by virtue of the fact that before any application for disposal or use of the public domain lands "under the public land laws" (the mining laws and Alaska lands excepted) the Secretary had the duty to process any application under any of the said laws "and in his discretion to examine and classify".

The Secretary could deny the application. He could allow the application. Once allowed under Section 7 the language of Section 7 itself, and also the specific language under CFR 296.6 "the applicant is entitled to a preference right of entry", which ripens into title upon completion of requirements as said by the Secretary's own regulations at that time, 43 CFR 296.7.

Fifth, the Appellees next go into the legislative history of the Taylor Grazing Act.

If this legislative history is gone into, the Court will easily find that first of all Section 7 and 14 were in the Taylor Grazing Bill when the Senate got through with the bill, and was a part of said Bill when it was approved on June 28, 1934 (48 Stat. 1269). Section 14 was not an independent act but a portion of the Taylor Grazing Act along with Section 7.

As originally passed in the Taylor Grazing Act Section 7 of the Taylor Grazing Act dealt only with the classification of land for homestead entries.[7] Could it be that Appellees were looking

[7] "Section 7. That the Secretary is hereby authorized, in his discretion to examine and classify any lands within such grazing districts which are more valuable and suitable for the production of agricultural crops than native grasses and forage plants, and to open such lands to homestead entry in tracts not exceeding 160 acres in area Such lands shall not be subject to settlement or occupation as homesteads until after same have been classified and opened to entry after notice to the permittee by the Secretary of the Interior, and the lands shall remain a part of the grazing district until patents are issued therefor, the homesteader to be, after his entry is allowed, entitled to the possession and use thereof: PROVIDED, that no lands containing water holes, springs, or water supplies developed or improved by the holder of any grazing permit or his predecessor in interest shall be subject to classification, settlement, entry, or patent under the provisions of this section."

or wishfully thinking of this version of Section 7 when they state that Section 7 now only deals with homesteads.

Section 7 of the initial Bill was objected to by Congressmen both in the House and in the Senate because it dealt only with homesteads and would "absolutely abrogate the homestead law".[8]

This passage of Section 7 restricted the classification of land for entry to only homestead entries. This is the position that Appellees now want to take. However, happily, Congress discovered that this was unworkable and June 26, 1936, the Taylor Grazing Act was amended and Section 7 was amended to enlarge classification for entries to other types of persons who wish to obtain land other than mere homesteaders and to make such classifications available for all persons seeking "private entry" not just homestead entry. The initial Senate report which reported this proposed legislation and whose report was accepted and finally adopted as legislation is contained in Senate Report No. 2371 of the 74th Congress, Second Session. On page 2 of this Senate report, the Senate Committee on Public Lands and Surveys reported as follows:

> "It is proposed to amend Section 7 of the Taylor Grazing Act so as to provide a more practicable and satisfactory method of classification of lands within a grazing district and to *make available for private entry* lands which are more valuable for other purposes than grazing." (Emphasis Supplied)

After this report was adopted by the Senate, it was approved by the House.

Therefore, Congress wished to change the law and give the right of entry to all people other than merely homestead entrymen.

The new Section 7 of 1936 of the Taylor Grazing Act further provided that:

> "Upon the application of any applicant qualified to make an entry . . . under the public land laws . . . the Secretary of

[8]Congressional Record, 73rd Congress, 2d Session, April 10, 1934, page 6369.

the Interior shall cause any tract to be classified and such application, if allowed by the Secretary of the Interior, *shall entitle the applicant to a preference right to enter . . .*" (Emphasis Supplied)

In regards to the rights of someone who has made an entry in general, it is stated in 73 CJS Public Lands, Section 41, Page 691 as follows:

"General, one who has made a legal entry on public land acquires an equitable title or equitable rights, but the naked legal title to the land remains in the government until the issuance of a patent therefor. The equitable title cannot, if his entry was legal and valid, be divested without his consent, and his right to the patent can be defeated only by a finding by the land department that he was not qualified to acquire the title, or that the land was not subject to his entry, and in this respect the character of the land is to be determined by the facts as known to exist at the date of such entry."

If Congress had intended to have said Section 7 of the Taylor Grazing Act apply only to homesteads, as Appellees would have this Court believe, then all it would have had to have done would have been to leave said section as it existed in 1934 instead of amending it in 1936.

At this time, Section 14 was still a section of the Taylor Grazing Act along with Section 7. As to what Appellees on Page 20 of their brief call "the independence of the Isolated Tracts Act from the homestead laws", we respectfully point out that Congress never did pass any such named Act as "The Isolated Tracts Act".

The legislative history attendant the initial authority for the sale of isolated tracts which Appellees set forth on Page 17 of their brief, is garbled and with an apparent intent to label the Taylor Grazing Act as the "Isolated Tracts Act".

This, of course, is not so. Section 14 is a section of the Taylor Grazing Act and this Section 14 provides for the sale of "isolated and disconnected and rought and mountainous tracts". To label the Taylor Grazing Act as the "Isolated Tracts Act" even parenthetically as Appellees do on their Page 17 is as miseading and as

wrong as their presentation to this Court in *Ferry vs. Udall* in creating the picture that there actually was a separately named 80-year-old act named "The Isolated Tracts Act".

As it originated in the Act of August 3, 1846, the sale of isolated and disconnected tracts *did* most certainly have to do with both homesteads and sales. The Act of August 3, 1846, was entitled, not the Isolated Tracts Act, but "An Act for the Adjustment All Suspended Preemption Land Claims in the Several States and Territories".

It was Section 5 thereof which provided for the sale of lands of the "second class" and such other "isolated or disconnected" tracts; it covered homesteads and sales. It was this Section 5 of the Act of August 3, 1846, which was incorporated into the Revised Statutes as Section 2455. Sale was not by public auction. Lands were not evaluated, price was $1.25 per acre, later $2.00 per acre for certain lands.

So this is the history of Section 2455 of the Revised Statutes, actually Section 5 of the Act of August, 1846, whose title had no more relation to the appellation "The Isolated Tracts Act" as the Taylor Grazing Act has because it embodies within it as its Section 14 a section which provides for the sale of "isolated and disconnected and rough and mountainous tracts".

Yet Appellees persist in attaching the appellation "The Isolated Tracts Act" to both laws. Why? Because in the case of *Ferry* v. *Udall*, supra, they painted such a picture of an "80 year old" separate one paragraph Act of Congress that the decision of this Court in that case does not even mention Section 7 or Section 14 of the Taylor Grazing Act; does not even mention as such the Taylor Grazing Act itself; but on the contrary speaks specifically of "The Isolated Tracts Act".

On Page 19 and 20 of Appellees brief they take refuge in current regulations and cite 43 CFR, subpart 2211. The question might well be asked what do current regulations have to do with this case? Appellees speak of the 2200 series. These did not

come into being until April 1, 1964.

The eight-year-period we are dealing with in the subject case started April 25, 1956, with the application for public sale (when Appellant was 58 years of age), and the period ended with the final decision of the Secretary on December 20, 1963 (when Appellant was 65 years old).

During that entire period, in fact from December 1, 1954, to April 1, 1964, the regulations applicable to our subject case were Part 250-Public Sales and Parr 296-Classifications; and the language never varied during that period as to 43 CFR 250.1 of 250.4(b) or 250.11 or 250.12(c) nor did it vary as to 43 CFR 296.1 or 296.2 or 296.6 or 296.7. It was not until July 28, 1964, that the Secretary made effective the parts 2200 which he tries to inject into the facts at this late date.

On Pages 20 and 21 of their brief, Appellees say that appellants "ignore" the provisions of 43 CFR 250.5.

Appellants do no such thing. It is the Secretary who ignores all of his other regulations of Part 250 and Part 296 in order to make a sovereign use of one of them over all the others. If the Secretary's position is correct, and the position of this Court in the *Ferry* case is correct, then there is no sense in having any of the other regulations under the whole Taylor Grazing Act.

It is appellants who misuse 43 CFR 250.5. They ignore the decisions of the Supreme Court of the United States which say that the language contained in such regulations as 250.5 is not peculiar to just one of the public land laws but on the contrary appears in the regulations covering many of them, that the power of the Secretary in such words is not arbitrary but on the contrary is "judicial in nature" and that it is the plain "duty" of the Secretary under that language to make a "judicial determination" as to whether or not what was required to be done has in fact been done.[9]

In this regard the Court should remember that Appellees have

[9]Daniels vs. Wagner, supra.

admitted in the lower Court that Appelants have done all that was required of them to do under the law and the regulations. It is the Secretary who in the *Ferry vs. Udall, supra,* case sold this Court on the proposition that the whole gravamen is not the compliance with the rules and regulations and the performances required thereunder, but the issuance of a piece of paper reciting that these acts have been done.

The Secretary, using an arbitrary and sovereign application of 43 CFR 250.5, interjected new issues four and a half years after the initial sale, merely because a piece of paper, a so-called cash certificate, an inter-office memorandum, had not been issued. He disregards the provisions of 43 CFR 250.5 and 43 CFR 250.12(c) which specifically state that when the acts have been done a cash certificate *"will"* issue and disregards 43 CFR 296.1-296.7 inclusive, and ignores the Taylor Grazing Act and Sections 7 and 14 thereof in favor of some mythical isolated tracts act.

And to extend the proposition of unbridled power within the Secretary, the Appellees, in their own brief, warned this Court that nothing they state in their brief should be construed to bind them to the position that even the issuance of a piece of a piece of paper called a cash certificate will bind them.[10]

II

On Pages 13 and 14 of Appellees' Brief, Appellees deny there is any distinction between the two cases involved in *Ferry vs. Udall* and Appellants' Lewis case now before this court. This is simply not the fact. There is a difference. Some of these distinguishing facts from *Ferry vs. Udall, supra,* are:

1. Appellants' sale was vacated by the Manager, Phoenix, Land Office, on the basis of a retroactive application of certain unpublished in the Federal Register "anti-speculation" press release policy pronouncements of February 5 and 23, 1960, issued by Secretary Seaton. No mention was made of price; the Udall policy pronouncements of 1961 had not yet been made.

[10]Page 16 of Appellees Brief.

Neither the *Ferry (Baker)* sale, nor the *Freeman (Copeland)* sale were ever vacated by the Manager, Phoenix Land Office. The *Ferry* case went up to the Secretary through the Director on a charge of illegal bidding at the sale. There the Assistant Secretary struck it down twice, the last time on the basis of price as set forth in the new Secretary Udall's price policies of February 14, 1961.

The *Freeman* case went up to the Director on appeal from a fight between preference right applicants where the Director himself vacated the sale on the basis of price as set forth in the Udall price policies of February 14, 1961.

Neither of the two cases or sales involved in Ferry vs. Udall case were ever turned down on the basis of the Seaton "Anti-Speculation" policies.

2. In Appellants' case on October 11, 1960, the Director affirmed the vacating by the Manager of the Applicants' sale on the same basis, that is, the Seaton "Anti-Speculation" policies.

In neither of the two *Ferry vs. Udall* sales were they vacated at any stage for that reason. They were vacated on the basis of Secretary Udall's February 14, 1961, price policies.

3. Some 4½ years after the Appellants' sale was vacated by the Manager, Phoenix Land Office, the Secretary considering the case on appeal, injected for the first time the matter of price. He found that the Government's own employees had 4½ years before made a mistake in valuating the land, decided the Government had made a bad bargain, and therefore he upheld the vacating of the sale on a basis never before presented in the proceedings.

This 4½ year time issue was not prevalent in the two sales involved in *Ferry vs. Udall.*

4. After the Secretary had made the final decision on December 20, 1963, in Appellants' case, and while Appellants' attorney was preparing briefs for filing in the Court below, it was discovered that Arizona State Supervisor, E. I. Rowland, had actually directed the Manager of the Phoenix Land Office to vacate Appellants'

Sale. He did this according to his memorandum letter of June 1960 to the Manager on two (2) grounds:

(a) The retroactive application of the "Anti-Speculation" policies of the Secretary, and

(b) He, himself, had made a unilateral investigation and had determined in his own mind that Mr. Lewis was a speculator and should therefore be punished by having the sale vacated.

and for these two reasons, the Arizona State Supervisor ordered the Manager to vacate the sale of November 3, 1959.

This situation was not present in either of the *Ferry* cases.

5. Other actions of the Secretary and the then Director in the treatment of Lewis during the processing of his appeals, involved, among others, a disregard by those officials of the Secretary's own regulations.

None of these abuses were present in the case of *Ferry vs. Udall.*

Finally, it is to be pointed out that the act of branding Mr. Lewis as a speculator under policies of the Secretary, do amount to a bill of attainer by said Secretary and for this proposition Appellants refer this Court back to his original brief.

CONCLUSION

For the reasons stated, it is respectfully submitted that the District Court's Order granting Appellees' motion for summary judgment and denying Appellants' motion for summary judgment be reversed, and the cause be remanded with instructions to enter an Order granting Appellants' motion for summary judgment and denying Appellees' motion for summary judgment.

Respectfully submitted,

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